No. 99-571

IN THE
Supreme Court of the United States

E. JEAN JOHNSON and BASILIO FONTANA,
Petitioners,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In the decision below, the Ninth Circuit correctly declined to note the issue, raised for the first time on appeal, of whether the National Association of Letter Carriers, AFL-CIO violated the procedural due process rights guaranteed to union members under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 401 *et seq.* and the Constitution of the NALC ("NALC Constitution") when it did not respond to each and every appeal taken by Petitioners Johnson and Fontana to the NALC Committee on Appeals. The following questions are therefore raised by the Petition:

1. Whether the Ninth Circuit Court of Appeals was correct in holding that an issue raised for the first time on appeal was properly rejected.

2. Whether, as the Courts held below, the NALC did not ratify the disciplinary actions taken against Petitioners by Branch 1100 and Petitioners have no further claims against the NALC.

3. Whether the issues raised by Petitioners are moot.

LIST OF PARTIES

Petitioners:

E. Jean Johnson
Basilio Fontana

Respondent:

National Association of Letter Carriers, AFL-CIO

Other Defendants in District Court Appeal:

National Association of Letter Carriers, Branch 1100

Arthur Turner
William Heintz
John Wellen
Howard Kashinsky
John Jackson
Charles Miller
Thomas Coladonato
Kirk Baiz
Richard Misner
Norberta Fullen
Bonnie Lippincott
Richard Felde
Bruce MacDuffee
Michael Rotcher
Barbara Stickler

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent National Association of Letter Carriers, AFL-CIO ("NALC") respectfully opposes the Petition for a Writ of Certiorari filed by E. Jean Johnson and Basilio Fontana ("Petitioners").

OPINIONS AND ORDERS BELOW

In its Orders of May 2, 1997 (Johnson) and May 13, 1997 (Fontana), the District Court granted Respondent's Motions for Summary Judgment. The District Court's Orders were upheld on appeal by the Court of Appeals for the Ninth Circuit in a Memorandum Opinion issued on July 2, 1999.

JURISDICTION

The instant Petition for Writ of Certiorari invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Subchapter II of the Labor Management Reporting and Disclosure Act (Bill of Rights of Members of Labor Organizations), 29 U.S.C. § 411.

STATEMENT OF THE CASE

On May 10, 1994, Petitioner Basilio Fontana commenced an action in the United States District Court for the Central District of California, entitled *Basilio Fontana v. National Association of Letter Carriers, Branch 1100, et al.*, USDC Case No. CV 94-3024 CBM, naming National Association of Letter Carriers, AFL-CIO ("NALC"), National Association of Letter Carriers, Branch 1100 ("Branch 1100") and various Branch 1100 officers as Defendants. On June 6, 1994, Petitioner E. Jean Johnson commenced a nearly identical action against the same Defendants, entitled *E. Jean Johnson v. National Association of Letter Carriers, Branch 1100 et al.*, USDC Case No. CV 94-3765 CBM.

The District Court entered Judgment in favor of the Respondent in the *Johnson* matter on May 6, 1997 and in the *Fontana* matter on May 13, 1997. Both Johnson and Fontana filed timely appeals. The Ninth Circuit affirmed the District Court findings in favor of NALC in an unpublished Memorandum Opinion issued on July 2, 1999.

NALC is a national union that represents over 300,000 letter carriers employed by the United States Postal Service. NALC has as its components 50 State Associations and numerous affiliated local unions, called "Branches."

NALC members are also members of one of NALC's affiliated local Branches. The Branches are distinct, self-governing organizations, which elect their own officers, hold property, and hire, fire and supervise their own employees. Branches are subject to NALC's overall authority in areas such as collective bargaining and the handling of grievances arising under collective bargaining agreements.

The relationship between NALC and its Branches is governed by tht NALC Constitution itself, by the NALC's Constitution for the Government of Subordinate and Federal Branches ("CGSFB"), and by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA", 29 U.S.C. § 401 *et seq.*). The NALC Constitution gives each Branch the right to adopt its own by-laws and to amend them as it sees fit, subject only to the requirement that they do not conflict with the NALC Constitution. Branch members have the right under the NALC Constitution and the LMRDA to elect their own officers, hire their own employees, maintain bank accounts and property under the Branch's control, and conduct the affairs of their Branch democratically. The duties of the National officers/agents are set forth in the NALC Constitution. NALC can intervene in a Branch's affairs *only* under the conditions provided for in Article 18 of the NALC Constitution and LMRDA § 302, 29 U.S.C. § 462. Branches are left to operate autonomously without interference from NALC.

Article 10 of the CGSFB provides detailed procedures for the handling and processing of internal union charges at the Branch level.[1] Appeals from Branch-level disci-

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[1] Article 10 of the CGSFB provides, in pertinent part:

Section 1. Any member of the Branch who shall violate the Constitution or By-laws of the [NALC] or Branch may

plinary actions are set forth at Artticle 11, Section 4(a)

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have charges preferred against him/her, and if such charges are proved shall be fined, reprimanded, suspended or expelled as the laws may direct or the Branch determine. Any officer of the Branch who shall fail or neglect to discharge the duties of his/her office, or who may be guilty of gross misconduct, may be removed from office. . . .

Sec. 2. Charges must be made in writing, specifying the offense, failure, neglect, or misconduct so as to fully apprise the member or officer of the nature thereof. . .; and a copy of said charges . . . shall be served upon him/her. . . .

Sec. 3. The president . . . shall then appoint a committee of three disinterested members, who shall forthwith summon the parties, hear and take down or cause to be taken down or recorded, the testimony and/or documentary evidence presented. It shall be the duty of the committee to find the true facts and report to the Branch. The parties are entitled to be heard by the committee, to present evidence, and to cross-examine all witnesses who make statements to the committee, but rules of evidence and rules of judicial procedure need not be observed. The committee, after completing its fact-finding duty, will present to the Branch a written report of the facts elicited, and immediately thereafter disband and be eligible to vote. The Branch shall then decide, by simple majority vote, the issue of whether or not the facts, as found by the committee, sustain the charge. The charged party is entitled to defend himself/herself before the Branch immediately before the vote is taken. If the Branch decides that the facts sustain the charge, then the Branch shall entertain a motion to fix the penalty, if any be required.

Sec. 4. If suspension be determined upon, the Branch shall fix the term of suspension. . . .

Sec. 5. During the suspension for an offense, a member is not exempt from dues, and he/she shall be subject to all the penalties of Article 7, Section 4. for the non-payment of the same.

Sec. 6. Any member or officer suspended for any offense shall be reinstated on the removal of the cause and the payment of all demands against him/her, or at the expiration of the term for which he/she was suspended . . .

Sec. 8. Any . . . Branch Officer . . . who, having first been charged under this Article with using or attempting to use the

of the NALC Constitution [2] and Article 11 of the CGSFB.

Fontana was a member of the NALC from July 1, 1962 to May 11, 1993: he served as a Branch 1100 Vice President from January 20, 1979 to December 30, 1988, and the President of Branch 1100 from December 31, 1988 to May 11, 1993. Johnson was a member of the NALC from November 1973 through October 1993: she served as Fifth Vice President of Branch 1100 from February 7, 1989 to January 28, 1991, and as Fourth Vice President from January 29, 1991 to October 1993.

A. The Charges and Appeals Regarding Fontana

1. *Charges Resulting in Fontana's Removal from Office as President; Fontana's Appeal Denied.*

On or about February 9, 1993, Fontana was served with internal union charges, dated February 8, 1993 (hereinafter referred to as the "February 8, 1993 Charges against Fontana"), alleging:

> 3. Gross Misconduct—Fontana was alleged to have verbally and abusively attacked Norberta Fullen, Branch 1100's Executive Secretary Treasurer/ Health Benefits Representative on November 13, 1992.

Branch, or any portion of it, or his/her influence therein, for political purposes, is determined by the Branch in accordance with the procedures prescribed in this Article to be guilty of the charge, shall be guilty of perfidy and shall suffer expulsion.

[2] Article 11, Section 4(a) of the NALC Constitution provides:

> The Vice President, Secretary-Treasurer, and Chairman of the Board of Trustees shall constitute the Committee on Appeals. They shall examine all appeals and grievances that may arise . . . from a Branch to the [NALC] . . . . They shall notify the appropriate Branches, . . . the appellant, and the President of their decision . . .

4. Failure to Carry Out Duties of Office and Neglect of Duty—Fontana was alleged to have gone to Las Vegas at Branch expense but did not attend meetings of the NACL Health Benefits Seminar on October 24-27, 1992.

5. Failure to Carry Out Duties of Office, Neglect of Duty, Gross Misconduct—Fontana was alleged to have refused to follow the directive of the Branch 1100 Executive Council to turn in Branch credit cards by December 20, 1992.

6. Failure to Carry Out Duties of Office, Neglect of Duty, Gross Misconduct—It was alleged that on January 5, 1993, the membership of Branch 1100 voted to uphold the Motions approved by the Branch 1100 Executive Council on December 29, 1992; and that Fontana, in his capacity as Branch President, declared this vote null and void. It was further alleged that Fontana improperly spoke to these Motions from the Chair.

7. Failure to Carry Out Duties of Office, Neglect of Duty, Gross Misconduct—It was alleged that on December 29, 1992, the Branch 1100 Executive Council adopted a motion giving itself the authority to appoint the Editor of *The Union Carrier* (the Branch's newsletter), and to assign the Editor exclusive editorial control over its contents. It was further alleged that on February 5, 1993, Fontana and Johnson instructed the printer to change the article scheduled to appear on the front page of the Februray/March 1993 issue to an article written by Fontana about his choice for 1992 Shop Steward of the Year. It was further alleged that Fontana instructed the printer that this was to be a February only issue, not the February/March issue designated by the Editor. It was further alleged that these acts would cost the Branch an additional $4,000.

On or about February 9, 1993, Fontana was served with a sixth internal union charge for "Perfidy," dated February 9, 1993, alleging that Fontana refused to assign Executive Secretary Treasurer/Health Benefit Representative Norberta Fullen to attend the Las Vegas National Health Benefits Seminar for personal political reasons.

Charge No. 1 of the February 8, 1993 Charges against Fontana was voted on by the Branch 1100 membership on March 9, 1993, with Fontana being found guilty as charged, and with a reprimand adopted as the penalty for this offence, to include a written apology by Fontana to Fullen to be read at the next two membership meetings. Thereafter, at an April 13, 1993 Branch 1100 membership meeting, Fontana stated that he would give Fullen a verbal apology and that he was sorry.

On May 11, 1993, the general membership of Branch 1100 voted to sustain all of the remaining charges against Fontana and approved his immediate removal from office as President as the penalty for such alleged misconduct.

On May 28, 1993, Fontana filed an appeal with the NALC Office of Appeals from the May 11, 1993 action of Branch 1100 removing him from office as Branch President. Statements and arguments on behalf of both Fontana and Branch 1100 were submitted for NALC review.

No hearing was held by the NALC's Committee on Appeals concerning Fontana's appeal, nor was one required under the CGSFB. The Committee does not conduct a *de novo* review of the matter; rather it decides if the Branch's decision violates the NALC Constitution or the Branch's By-laws. In addition, the Committee reviews whether the Branch used the proper Constitutional procedure in reviewing the charges and considers whether there is sufficient basis to support the Branch's decision. In the case of Fontana's appeal from his removal from

office, the Committee on Appeals issued its written decision in NALC Appeal #24 on November 9, 1993, as follows:

> Based on an examination of the evidence in the record, the Committee on Appeals finds that [Fontana's] appeal is without merit. The Committee finds that the Branch, through its investigation committee, sufficiently carried out all its duties under Arrticle 10 of the CGSFB. In particular, the [investigatory] committee's presentation of the facts to the Branch, as well as the Branch's final decision on this issue, was not contrary to the obligations prescribed in the NALC National Constitution or the CGSFB.
>
> Accordingly, it is the decision of the Committee on Appeals that the appeal by Brother Fontana be, and hereby is, denied.

2. *Charges Resulting in Fontana's Suspension from Membership; Fontana's Appeal Upheld.*

On August 9 and 10, 1993, respectively, Branch 1100 members Bruce J. MacDuffee and Michael Rotcher filed a series of additional internal union charges against Fontana, this time seeking Fontana's expulsion or suspension from membership in Branch 1100. The charges were heard by Branch 1100's membership at a September 14, 1993 meeting, where the Branch membership voted to sustain a number of the charges against Fontana, but deferred imposing a penalty until its October 7, 1993 meeting. At the October 7 meeting, the membership voted to suspend Fontana's union membership through May 30, 1995.

In early October 1993, Fontana filed an internal union appeal with the NALC Office of Appeals from the September 14, 1993 action of Branch 1100, finding him guilty of the allegations set forth in the charges that

Branch 1100 members MacDuffee and Rotcher had filed against him in August 1993. On or about October 26, 1993, Fontana filed an appeal with the NALC Office of Appeals from the October 7, 1993 action of Branch 1100 suspending him from membership.

Again, no hearing was held by the NALC's Committee of Appeals concerning Fontana's appeals, nor was one required under the CGSFB. Again, the Committee did not conduct a *de novo* review of the matter; rather it decided if the Branch's decision violates the NALC Constitution or the Branch's By-laws and reviewed whether the Branch used the proper Constitutional procedure in reviewing the charges and considered whether there is sufficient basis to support the Branch's decision. In the case of Fontana's appeals from his suspension from membership, the Committee on Appeals issued its written decision in NALC Appeal #35 on November 10, 1993, as follows:

> Based on an examination of the evidence in the record, the Committee on Appeals finds [Fontana's] appeal should be sustained. Every member has the right under the Constitution to file internal union charges. Thus, the Committee on Appeals finds that it is contrary to the purposes of the constitution to suspend membership on this basis. Secondly, while Mr. Fontana's other alleged conduct may be grounds for discipline or removal from his position, such conduct is not an appropriate basis for suspension of membership.
>
> Accordingly, it is the decision of the Committee on Appeals that the appeal by Brother Fontana should be, and hereby is, upheld.

Although the NALC uheld Fontana's appeals, his suspension from membership remained in effect due to his

failure to fulfill his union dues obligation during the pendency of his appeal. Pursuant to Article 10(5) of the CGSFB, a member is required to fulfill his dues obligation even during periods of suspension. Failure to do so results in a forfeiture of membership rights.[3] Fontana has admitted that even suspended members are obligated to pay dues. Yet, upon his removal from office as President in May 1993, Fontana had ceased paying his union dues. Even after November 10, 1993, when the NALC had overturned his suspension of membership based on the merits of the internal union charges presented against him, Fontana did not bring his union dues obligation current. Therefore, under the NALC's reasonable and uniform membership rules, Fontana forfeited his right to reinstatement of membership.

B. The Charges and Appeals Regarding Johnson

1. Richard Felde's August 10, 1993 charge against Johnson.

On or about August 10, 1993, Branch 1100 member Richard Felde filed an internal union charge against Johnson based on Johnson's support of Fontana's many charges aaginst other Branch 1100 members in the period commencing February 1993.[4] On September 14, 1993,

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3 With regard to the penalties for non-payment of dues, Article 10(5) references Article 7(4) of the CGSFB, which states, in pertinent part: Any member failing to pay any fine, assessment or monthly dues within thirty (30) days after the same shall become due, shall forfeit his/her membership. He/she shall vacate any office held in the Branch or Association, effective on the date of such forfeiture. He/she shall not be entitled to vote in the Branch, and he/she shall not be eligible for nomination or election to any office . . . .

4 The August 10, 1993 Felde Charge alleged, in pertinent part, that Johnson had "aided and abetted Basilio Fontana in his disruptive campaign against the stated purpose of Branch 1100. You

Branch 1100's membership voted to sustain the Felde Charge against Johnson, but deferred imposing a penalty until the General Membership Meeting scheduled for October 7, 1993.

2. Bruce MacDuffee's August 9, 1993 charge against Johnson and Michael Rotcher's August 10, 1993 charge against Johnson.

On or about August 9, 1993, Branch 1100 member Bruce MacDuffee filed an internal union charge against Johnson, claiming violations of Article 1, § 2 of the Branch 1100 By-laws [5] and Article 10(8) [perfidy] of the CGSFB, and alleging, *inter alia*, that Johnson had breached her trust to the Branch membership by aiding and abetting Fontana in the pursuant of his internal union charges against other elected officers of Branch 1100.[6]

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have repeatedly and continued to help him in the filing of false and frivolous charges against members of Branch 1100. The time and resources of the Union have been wasted by your irrational and irresponsible conduct. It is obvious to me that you are not working in the memberships' best interest and in fact are trying to destroy the union."

According to the September 14, 1993 Branch 1100 Investigating Committee Report into Felde's Charge against Johnson, Fontana had filed 34 individual charges against fellow unionists since February 1993.

[5] Article 1, § 2 of the Branch 1100 By-laws provides: "The object of this Branch is to unite all letter carriers in the area who are eligible for membership under Article III, Section 2 of the [NALC] Constitution, into one harmonious body for their mutual benefit and to assist the [NALC] in its efforts to improve the Postal Service."

[6] Specifically, the August 9, 1993 MacDuffee Charge alleged:

> Your actions of filing charges, and/or aiding and abetting and/or conspiring to file charges, against other elected officers of Branch 1100, has caused serious disharmony to the entire membership of Branch 1100 and the [NALC]. These actions have also contributed to a large financial burden on the Branch

Then, on or about August 10, 1993, Branch 1100 member Michael Rotcher filed another internal union charge against Johnson, claiming violations of Article 14, § 3 of the NALC Constitution and Article 10(1) and (8) [perfidy] of the CGSFB, along the same lines as the charges brought by Felde and MacDuffee.[7]

The Branch 1100 Investigating Committee Reports into MacDuffee's and Rotcher's Charges against Johnson found that grounds existed for upholding all charges except the claims of "perfidy." On October 7, 1993, Branch 1100's membership voted to sustain the MacDuffee and Rotcher

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funds by having to compensate each impartial investigative committee member every time new charges were instigated by you or your co-conspirators, in an obvious attempt to deplete these funds. You have used your position and influence, and you have made promises of Vice Presidential positions to members, in exchange for their support of your actions and to carry out your vendetta against the remaining elected Branch officers.

[7] The Rotcher Charge alleged, in pertinent part:

You [Johnson] have acted in collusion with and in support of Basilio Fontana in his efforts to destroy the Branch. This has severely hampered the ability of the Branch to conduct business, brought unnecessary expense, and seriously impaired its credibility. Your actions and statements have very nearly sabotaged policy directives and decisions made by the Branch for the good of the Branch. You have exceeded your authority and acted without and contrary to the authorization of the Executive Council and membership. You have ignored or refused to abide by the instructions of the President, the Executive Council, and the membership. You have continually subverted the will of the membership and publicly claimed that you do not recognize its authority in Branch meetings. You have violated your oath of office. You have been derelict in your duties as a Vice-President and failed to properly represent members of this Branch. You have attempted to turn other members against the Branch through lies, misrepresentation of the facts, and political campaigning on so-called "station visits." You have used your office and your influence with Basilio Fontana for political purposes.

charges against Johnson, and folowing up on its September 14, 1993 action on the Felde charge as well, imposed a penalty on Johnson of suspension of Union membership through May 30, 1995.

3. ***NALC response to Johnson's appeals concerning suspension of Union membership.***

On or about October 4, 1993, Johnson filed an internal union appeal with the NALC Office of Appeals from the September 14, 1993 action of Branch 1100, finding her guilty of the allegations set forth in the August 10, 1993 Felde Charge. Both Johnson and Branch 1100 submitted statements and arguments to NALC for its review.

On or about October 26, 1993, Johnson filed internal union appeals with the NALC Office of Appeals from the October 7, 1993 action of Branch 1100, suspending her membership until May 30, 1995 (although Johnson erroneously referred to such action as an "expulsion"), based upon the allegations set forth in the August 1993 MacDuffee and Rotcher Charges against her.

No hearing was held by the NALC's Committee on Appeals concerning Johnson's appeals, nor was one required under the NALC Constitution or the CGSFB. As with Fontana, the Committee on Appeals was not required to conduct a *de novo* review of the matter; rather it was to decide if there was a sufficient basis to support the decision of the Branch. In response to Johnson's October 1993 appeals, the Committee on Appeals issued its written decision on November 10, 1993, stating in pertinent part:

> Based on an examination of the evidence in the record, the Committee on Appeals finds [Johnson's] appeal should be sustained. Every member has the right under the Constitution to file internal union charges. Thus the Committee on Appeals finds that

> it is contrary to the purposes of the Constitution to suspend membership on this basis. Secondly, if proven, Ms. Johnson's performance of work outside the scope of her duties while on union time may be grounds for discipline or removal from her position, however, this is not an appropriate basis for suspension of membership.
>
> Accordingly, it is the decision of the Committee on Appeals that the appeal by Sister Johnson should be, and hereby is, upheld.

As with the Fontana charges and appeals, although the NALC upheld Johnson's appeals, her suspension from membership remained in effect because she failed to fulfill her union dues obligation during the pendency of her appeals. Upon her suspension from union membership, Johnson ceased paying her union dues. Even after November 10, 1993, when the NALC had overturned her suspension of membership based on the merits of the internal union charges presented against her, Johnson did not bring her union dues obligation current. Therefore, under the NALC's reasonable and uniform membership rules, Johnson forfeited her right to reinstatement of membership.

REASONS FOR DENYING THE WRIT

I. THE ISSUE WAS NOT RAISED ON APPEAL AND THUS IS NOT PROPERLY BEFORE THE COURT

On appeal to the Ninth Circuit, Petitioners asserted for the first time that, in addition to the matter of the NALC's alleged ratification of the acts of the Branch, there was a triable issue as to whether the NALC directly violated Petitioners' due process rights. The Ninth Circuit, appropriately, did not rule on the issue. An appellate court will not generally consider an issue that was not passed on below. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976);

Crawford v. Lungren, 96 F.3d 380, 389 n. 6 (9th Cir. 1996) [issues raised for the first time on appeal are ordinarily not considered on appeal.]

Although Petitioners alleged in their respective complaints that their due process rights were guaranteed by both the NALC's Constitution and the LMRDA, they had long ago waived any claims of "direct" violation of such rights by the NALC, if such claims ever existed. In the District Court, Petitioners admitted that their claims against the NALC were based strictly on a theory of "ratification"—*i.e.*, the NALC's alleged ratification of the acts of the Branch Defendants. Petitioners have not appealed the Ninth Circuit's ruling that the NALC did not ratify the Branch's actions. Therefore, there is no basis for this Petition and certiorari should be denied.

Petitioners did not argue in the District Court, nor in their briefs on appeal to the Ninth Circuit, that the NALC had some obligation to conduct an investigation beyond what is required by the NALC Constitution. The LMRDA leaves it to labor unions to develop their own rules and regulations for their internal management, so long as those rules and regulations are reasonable. 29 U.S.C. § 431. Petitioners have not challenged the NALC's Constitution as being unreasonable or deficient in any way. Petitioners have only challenged the conduct of the NALC and Branch Defendants within the framework of the NALC Constitution or the LMRDA.

II. EVEN IF THE ISSUE WAS ADDRESSED ON APPEAL, SUMMARY JUDGMENT WAS PROPER AND THE DECISIONS BELOW SHOULD BE AFFIRMED

In both the District Court and the Ninth Circuit, Petitioners asserted that their LMRDA "free speech" claims, were based on the NALC's alleged failure to grant the

October 26, 1993 appeals and overturn the Branch's action in sustaining the August 1993 MacDuffee and Rotcher Charges against Fontana and Johnson. Even assuming, *arguendo*, that the NALC failed to respond to the October 23, 1993 appeals, the NALC's lack of response still does not constitute ratification of the underlying action of which Petitioners complained.

As stated in *Rodonich v. Housing Wreckers Union Local 95*, 817 F.2d 967, 973 (2nd Cir. 1987) on which both Petitioners and the NALC relied below, "ratification can only occur when the principal, having knowledge of the material facts involved in a transaction, evidences an intention to ratify it." Here, the NALC had previously evidenced an intent to overturn Petitioner Johnson's suspension from membership based on the Felde charges and Petitioner Fontana's original suspension based on the MacDuffee and Rotcher charges brought against him. Petitioners contend that the NALC failed to respond to their appeals in connection with the October 7, 1993 Branch actions (which were substantially identical to the earlier appeals from the Branch's September 14, 1993 actions), that is, that the NALC was silent. However, taking into account both the NALC conduct vis-a-vis the earlier charges as well as the MacDuffee and Rotcher charges, there is *no evidence of an intent to ratify* the Branch's October 7, 1993 action concerning the MacDuffee and Rotcher charges. Rather, there is *substantial evidence of an NALC intent to overturn the Branch's actions.* Since Petitioners were required to establish such intent by "clear and convincing evidence," *Rodonich, supra,* 817 F.2d at 972-973, and could not do so even by a preponderence thereof, the NALC submits that both the District Court and the Ninth Circuit were correct in finding that the NALC did not "ratify" the Branch's action.

Where the Petitioners have shown no obvious or egregious error in the findings of the District Court and Court of Appeals, review by this Court is not warranted. The Supreme Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Berenyi v. Information Director*, 385 U.S. 630, 635 (1967); *Blau v. Lehman*, 368 U.S. 403, 408-409 (1962); *Graver Tank & Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). This Court "does not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Accordingly, there is no reason for the Court to grant certiorari in this case. The Petition should be denied.

III. THE ISSUE RAISED IN THE PETITION COULD HAVE NO IMPACT ON THE ULTIMATE OUTCOME FOR PETITIONERS AND IS THEREFORE MOOT

Petitioners do not question the *result* of the decisions below. They do not challenge the judgments entered against them. Rather, they seek a fresh bite at the apple by arguing that the Ninth Circuit erred in holding that a single, non-dispositive, issue was not addressed on appeal.

Revisiting the question of whether the NALC adequately handled Petitioners' appeals will have no effect on the outcome of this litigation. It is undisputed that Petitioners were ultimately expelled from the NALC for failing to pay membership dues while their internal union appeals were pending.[8] Petitioners have *never* questioned the

[8] The Ninth Circuit reversed the District Court's grant of summary judgment to Branch 1100 *only* on the ground that the charges brought against Fontana and Johnson were sufficiently specific to comply with § 411(a)(5) of the LMRDA. In the District Court, the Honorable Consuelo B. Marshall directly addressed Johnson's

NALC Constitution's requirement of dues maintenance, nor their resultant forfeited membership. The matter has therefore become moot.

"The test for mootness . . . is whether the relief sought would, if granted, make a difference to the legal interests of the parties (as distinct from their psyches which might remain deeply engaged with the events of the litigation.) *Air Line Pilots Assn., Int'l v. UAL Corp.*, 897 F.2d 1394, 1396 (7th Cir. 1990), *citing, North Carolina v. Rice*, 40 U.S. 244, 246 (1971). If granting the relief sought would make no difference to those interests, then the court is not really deciding a "case" and is therefore exceeding the power conferred on it by Article III of the U.S. Constitution. *Air Line Pilots Assn.*, 897 F.2d at 1396. While it is usually possible to "conjure up a set of facts under which the relief sought would make a difference" to the party seeking relief, if the relief would make only little difference, the case should be declared moot and relief withheld. *Id.*

Such is the case here. Both Fontana and Johnson ceased making membership dues payments after their appeals were filed. Regardless of the outcome of their appeals to the NALC, Petitioners' failure to pay dues was cause for suspension, and expulsion, from the Union. Neither Johnson nor Fontana ever made any effort to cure the delinquency in their dues payments. They were appropriately expelled from the Union for non-payment of dues. Even if this Petition is granted, and the Peti-

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disqualification from office for failuure to pay dues: "Evidence also shows that after NALC upheld her appeal and overturned the Branch's suspension of her mmebership, Johnson had ample opportunity to bring her membership obligations current and reinstate her membership." (*see* App. to Petition at 37; *see also*, Findings of Fact 22-24, App. at 33-34 and, with regard to Fontana, *see*, Finding of Fact 18, App. at 14.).

tioners could prevail on the merits, there is no relief that could overcome their knowing and voluntary failure to retain their membership status in the NALC. Petitioners themselves were ultimately the cause of their expulsion from the Union. The decisions below should therefore be affirmed.

CONCLUSION

For all of the foregoing reasons, Respondent NALC respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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